8

WM.

In the Supreme Cour

OF THE
UNITED STATES
FEBRUARY TERM, 1924.
NO. 336

FRED W. GOODING, NOVINGER & DARRAH SHEEP COMPANY, LTD., T. B. JONES, et al.,
Cross Appellants,

vs.

THE IDAHO IRRIGATION COMPANY, LTD., a Corporation, THE EQUITABLE TRUST COMPANY of NEW YORK, a Corporation, and LYMAN RHODES, as TRUSTEES, et al.,
Cross Appellees.

BRIEF OF CROSS APPELLANTS

UPON CROSS APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

W. G. BISSELL & BRANCH BIRD,
of Gooding, Idaho, and
KARL PAINE,
of Boise, Idaho,
Solicitors for Cross Appellants.

(29, 633)

INDEX

In the Supreme Court

OF THE
UNITED STATES
FEBRUARY TERM, 1924.
NO. 336

FRED W. GOODING, NOVINGER & DARRAH SHEEP COMPANY, LTD., T. B. JONES, et al.,
Cross Appellants,

vs.

THE IDAHO IRRIGATION COMPANY, LTD., a Corporation, THE EQUITABLE TRUST COMPANY of NEW YORK, a Corporation, and LYMAN RHODES, as TRUSTEES, et al.,
Cross Appellees.

BRIEF OF CROSS APPELLANTS

UPON CROSS APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

W. G. BISSELL & BRANCH BIRD,
of Gooding, Idaho, and
KARL PAINE,
of Boise, Idaho,
Solicitors for Cross Appellants.

(29, 633)

(In this brief all figures in parentheses refer to the respective page numbers of the transcript of the record, and all black-faced type appearing in the quotations is that of the writers.

For the sake of brevity the parties will be designated as they were in the District Court, that is, cross appellants will be referred to as "plaintiffs" and cross appellees as "defendants.")

STATEMENT OF THE CASE

The issues of this appeal involve primarily an interpretation of certain contracts and of the Act of Congress, commonly known as the Carey Act. This act is contained in sections 4685, et seq. U. S. Comp. Stats. 1918, which sections embody sec. 4 of the Act of Congress approved Aug. 18, 1894, 28 Stats. Large 422, the Act of Congress approved June 11, 1896, 29 Stats. Large 413, the Joint Resolution approved May 25, 1908, 35 Stats. Large 577, and the Act of Congress approved May 27, 1908, 35 Stats. Large 347. The appeal also involves an interpretation of the Carey Act of the state of Idaho, which act, with amendments, is contained in sections 2996 to 3068, inc., Idaho Compiled Statutes 1919.

The one purpose of these various enactments is to make possible the reclamation and settlement of arid lands by actual settlers. In brief, the government by these acts offers to grant to the state such lands as the state can reclaim or cause to be reclaimed and settled. However, before the gov-

ernment will segregate any lands for such purposes the state must "exhibit a plan showing the mode of contemplated irrigation and which plan shall be sufficient to **thoroughly irrigate** and reclaim said lands and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation." Sec. 4685 U. S. C. S. This section likewise authorizes the state to make all necessary contracts to cause such lands to be reclaimed, and to induce their settlement and cultivation.

The statutes of Idaho above mentioned provide, in effect, that any persons desiring to construct irrigation works under the Carey Act may file with the proper state department a request that it select certain lands, designating said land by legal subdivisions. "This request shall be accompanied by a proposal to construct the ditch, canal or other irrigation works necessary for the complete reclamation of the land asked to be selected." Sec. 2998 Ida. Comp. Stats. This proposal must reveal that the applicant has a permit to appropriate water, must approximate the cost of the work to the settler, etc. When this proposal has been approved by the department of reclamation of the state of Idaho and the U. S. Department of the Interior has withdrawn the lands from the public domain the state department may then "enter into a contract with the parties submitting

the proposal, which contract shall contain complete specifications of the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation works, **the amount of water per acre which said works will make available at the water user's headgate,** the price and terms per acre at which such works and **perpetual water rights shall** be sold to settlers . . ." Sec. 3004 Ida. Comp. Stats.

For a more detailed statement concerning the state and federal statutes involved in this cause see the statement of facts made by the Circuit Court of Appeals for the Ninth Circuit, in the case of Twin Falls Salmon River Land & W. Co. v Caldwell, 242 Fed. 177.

Pursuant to the above statutory provisions the defendant Idaho Irrigation Company filed its request and proposal with the proper state department, the lands therein described were set apart by the United States, and thereafter and on August 21, 1907 said Idaho Irrigation Co. and the state of Idaho entered into a contract (42 to 64), which was supplemented by another contract dated January 2, 1909 (64 to 86). By these contracts the Idaho Irrigation Co., which company is often referred to as the "construction Company," obligated itself to construct a reservoir and irrigation system and to provide for the sale of shares or water rights in said system to settlers filing up-

on the lands mentioned in the contract and proposal (44). It was agreed that the water right of each settler upon the project should be of equal right and priority with that of every other settler, irrespective of the date of the sale (50-1), and each purchaser should have one-eightieth of one cubic foot per second of time per acre for the irrigation of his land (49). This contract, which is commonly called the "state contract", also provided that the Idaho Irrigation Co. should organize a corporation to be known as the Big Wood River Reservoir and Canal Co. to take over the management and control of said system (54). This latter company was to be known as the "operating company," and its members were to include only the purchasers of said water rights. Each share of stock in the latter company represented a water right of one-eightieth of a cubic foot per second of time per acre and a proportionate interest in the system (57.)

The Idaho Irrigation Co., the construction company, sold water rights to the settlers by contract, the form of which contract is contained at pages 86 to 96 of the record. This contract provides that "each share entitles the owner thereof to receive one-eightieth of a cubic foot of water per second of time for the irrigation of and domestic uses on the following described land . . . ; and this Certificate also entitles the owner to a proportionate

interest in the dam, canal, reservoir, water rights and all other rights and franchises of this Company, based on the number of shares finally sold, . ." (89). The above mentioned "state contract" is incorporated into and made a part of each settler's contract (90 and 96).

The Idaho Irrigation Co. proceeded with the sales of water for several years, using the form of contract last referred to for that purpose. Early in December, 1917 the plaintiffs, having concluded that the Idaho Irrigation Co. and its trustees had oversold the available supply of water and the carrying capacity of its system, filed the complaint which is contained at pages 15 et seq. of the record. The complaint is on behalf of all the settlers on the tract, and in brief alleges; The purpose of the incorporation of the Idaho Irrigation Co., as explained above; that the Equitable Trust Co. and Lyman Rhodes, trustees, and M. R. Kays, trustee, are trustees for the stockholders of the Idaho Irrigation Co. (18); that under the terms of the state contract and the settlers' contract the Idaho Irrigation Co. agrees to furnish and deliver to the settlers upon the project all of the appropriated water of the system, to the extent of one-eightieth of a cubic foot per second of time per acre (21-2); that when said Idaho Irrigation Co. had sold water rights sufficient to exhaust the appropriation of water and sufficient to employ the

total carrying capacity of the ditches and system its right to sell further water thereupon ceased (23); that the Idaho Irrigation Co., its trustees and bondholders, and the settlers were aware of the terms and conditions of the contracts above mentioned, and were bound thereby (26); that the certificates of stock issued to the settlers entitled them to receive one-eightieth of a cubic foot of water per second of time per acre, and a proportionate interest in the irrigation system and dam (29); that the lands of the plaintiffs and all the settlers under the project are semi-arid in character and worthless for agricultural purposes without the above amount of water (30); that at the contract rate per acre the actual available water supply of the Idaho Irrigation Co. is only sufficient to irrigate 41,248 acres, whereas over 90,000 acres have already been contracted for, and therefore that said Idaho Irrigation Co. has already oversold its appropriation of water by 24,000 acres or shares (32); that sales in excess of such appropriation are a wrong and fraud upon the plaintiffs and their co-settlers and amount to taking their property without due process of law (33); that of the said 90,000 shares so sold, 21,555 have been re-acquired by foreclosure and re-purchase and are held by the Idaho Irrigation Co. and its trustees (33); that 75,645 shares are held by actual bona fide settlers, and this latter amount

actually requires more than the appropriated water (34); that the defendants are offering further water contracts and shares for sale and unless restrained by order of court said parties will sell further water rights, which further sales, if made, will deprive the plaintiffs and their co-settlers of a proportionate share of their water right and interest in said irrigation system, and so impair their water right as to make it impossible for them to produce ordinary agricultural crops, and thereby render their water right valueless (35); that the defendants are unable to respond in damages, and plaintiffs have no remedy at law (35); and the prayer of the complaint is that the defendants be permanently enjoined and restrained from selling or disposing of any further water rights which may be held as assets of the Idaho Irrigation Co., or otherwise (36-7).

The action was originally filed in the state court, where a lis pendens was recorded in accordance with the provisions of sec. 6674 Ida. Comp. Stats., which section provides that "In an action affecting the title, or the right of possession of real property," the filing of a lis pendens is constructive notice of the pendency of the action (682). The lis pendens appears at pages 214 et seq, of the record. Thereafter the cause was removed to the federal court.

By way of answer the defendants admit that

the certificates of stock in the Big Wood River Res. & Canal Co. **entitle the purchaser thereof to receive one-eightieth of one cubic foot of water per second of time per acre;"** and a proportionate interest in the irrigation works and system (113); defendants also **"admit that said contracts, Exhibits "C" and "D", limit the rights of the said Idaho Irrigation Co. to the sale of a sufficient number of the shares** of capital stock in said Big Wood River Res. & Canal Co. **to the capacity of the system to furnish and distribute in accordance with said contracts, and to the actual appropriation of water available for irrigation purposes;" (114).**

Defendants "Admit that under and by virtue of the terms of the said contracts, Exhibits "C" and "D", when the said Idaho Irrigation Company, Ltd., had in truth and in fact sold shares in said company which should and did represent the actual amount of water available and appropriated, and when said sale of shares should equal the carrying capacity of said irrigation system, then and in that event, the said Idaho Irrigation Company should make no further sales of water rights by means of selling and issuing shares of stock in the said Big Wood River Reservoir Company, Ltd.: deny that said defendant, Idaho Irrigation Company, Ltd., has sold shares of stock in the Big Wood River Reservoir and Canal Company, Ltd.,

which represent either the full amount of water available and appropriated or the carrying capacity of the said irrigation system;" (114);
admit that the land requires water to produce ordinary agricultural crops (115), but deny that 1-80 of a cubic foot per second of time per acre is necessary for said purposes (115); allege that there is sufficient water and that the system is adequate to furnish and deliver an ample supply of water to all of the lands now remaining in said segregation (116-7), to-wit, 121,000 acres (115); allege that 87,233 shares have been sold and there remains unsold 25,638 shares (117); admit that M. R. Kays and Lyman Rhoades, as trustees, have 10,706 shares, which they hold as assets of the Idaho Irrigation Co., for the benefit of the bondholders of such company (118); deny that further sales would decrease the water rights of the plaintiffs (120); allege that the Idaho Irrigation Co. has the right to sell and is offering to sell the remaining shares "equal in number to the irrigable acres remaining in said project after deducting the number of acres relinquished and to be relinquished." (121); allege that by issuing patent to the state of Idaho for 117,677 acres in said segregation the Secretary of the Interior of necessity determined that the appropriated water was sufficient and the system adequate to furnish and deliver water to the settlers, and that such determi-

nation concluded the issues in this cause, and estopped the plaintiffs from maintaining the action (122-3-4).

The state of Idaho intervened, alleging that through its Commissioner of Reclamation it had forbidden the defendants to make any further sales or contracts of sale of water rights under said project (130), and further alleging "that in event additional water rights be sold from the system, that water will be available under said contracts for water rights only to the extent that he present holders of contracts are deprived thereof, which will result not only in untold hardship and privation and financial loss to persons who may purchase the said contracts, but as well to those persons who are already holders of such contracts and will also deprive those persons who are now the holders of such contracts of the property rights to which they are entitled under the terms of their contracts;" (131). This intervention was made by the state as a trustee for the settlers, and because of the state's statutory and constitutional duty to enforce and regulate the waters of the state (131), and in effect intervener prayed that the prayer of plaintiff's complaint be granted (132). Prior to this intervention the Commissioner of Reclamation of the state of Idaho, under authority of sec. 3004 Ida. Comp. Stats. (full text of this section at pages 671-2 of record), had for-

bidden the defendant irrigation company from selling further water or entering into further contracts to sell water (134-6).

Upon the issues thus joined a trial was had, and the District Court entered a decree in accordance with plaintiffs' prayer (153). Among other things, the District Court stated in its opinion as follows:

> "The Federal Law (Carey Act) expressly requires an ample supply of water, and clearly contemplates that only ample water rights shall be sold. Under the statutes of the state (Idaho Compiled Statutes, Sections 3065 and 5636), it was unlawful for the defendant to sell in excess of the capacity of its works or more water than was available to it. Rayl (State) v Twin Falls Salmon River Land & Water Co., 30 Idaho 41 (166 Pac. 220). And by its contract with the state defendant expressly covenanted that it would not exceed these limitations." (146) .. ..
>
> "It is sufficient to know that with the duty herein before recognized the supply is and will be insufficient to meet the demands of the outstanding contracts, exclusive of those involved in this suit, and I have no hesitation in so finding. Accordingly, the prayer of the complaint will be granted." (151).

The decree as entered enjoins the sale of further water or water contracts, including the shares which defendants have acquired through purchase, foreclosure, etc., and decrees to be of no effect certain contracts specifically enumerated therein (154 et seq). These latter contracts which

were cancelled and decreed to be of no effect were contracts which became operative after the recording of the lis pendens in the cause.

Upon appeal from this decree the Circuit Court of Appeals for the Ninth Circuit, after confirming and approving the conclusions of the District Court, concludes its opinion (649-683, also 285 Fed. 453) with these words:

> "We are of the opinion that the evidence supports the findings contained in the opinion of the Court, and that the findings and conclusions of law support the decree. The decree is accordingly affirmed." (683).

Thereupon the defendants filed a petition for rehearing which was denied by opinion and order filed October 4, 1922 (689-692), but in denying this petition the Circuit Court reversed the decree of the District Court to the extent of permitting the defendants to sell 5322.26 additional shares, which number represented shares owned by the Idaho Irrigation Co. and its trustees at the time of the commencement of the suit, and not resold prior to the trial of the cause (689). By leave of Court (693) plaintiffs filed a motion for reconsideration of said order of October 4, 1922, which is denominated a "supplemental opinion" (695). This latter motion was denied (697) by order filed February 19, 1923. Therefore, the decree of the District Court stands affirmed in part and reversed in part. Defendants have appealed to this Court from that

part of the Circuit Court's decree affirming the District Court's decree, and the plaintiffs have appealed to this Court from that part which reverses the District Court and permits additional shares to be sold, and also from the order denying the motion for reconsideration.

SPECIFICATIONS OF ERROR

FIRST: This specification is embodied in paragraph "B" of the first assignment of errors (725), and is to the effect that the action of the Circuit Court of Appeals in reversing the District Court and directing that 5322.26 additional shares or acres may be sold by defendants is contrary to the findings of the trial court, which findings were had upon disputed questions of fact, and should not, therefore, be disturbed by an appellate court.

SECOND: This specification is embodied in paragraphs "A" and "C" of plaintiffs' first assignment of errors (725), and is that the Circuit Court erred in reversing the District Court and permitting additional shares to be sold, because said shares were the property of the defendants at the time of the institution of the action and should, for this reason, have been subjected to the injunction, and because there is nothing in fact or law to differentiate between said shares and other shares of the defendants that were subjected to the injunction.

THIRD: The Circuit Court erred in its order

of February 19, 1923, whereby plaintiffs' petition for modification and rehearing was denied, because the Circuit Court, having in its original decree affirmed the decree of the District Court, could not thereafter reverse the District Court to the extent of 5322.26 shares without first granting a rehearing. This specification is in substance the same as the second assignment of errors (725-6).

BRIEF OF THE ARGUMENT

It is alleged in the complaint (29-0) and admitted in the answer (114) that when the defendant sold shares representing the actual amount of water available and appropriatied it should sell no further shares; it is alleged in the complaint (32), but denied in the answer (114) that at the time of the institution of the present action the defendant irrigation company had already oversold the available appropriated water. Upon the issues thus joined evidence was taken, and the District Court found the defendant irrigation company could not more than supply its outstanding contracts, **exclusive of those it had acquired through foreclosure proceedings** (151) and the defendants were enjoined from selling further water rights. This finding of the District Court upon a disputed question of fact, there being conflicting evidence, should be conclusive upon appeal. Argued at pages 20 to 23 of this brief.

McKinly Creek Mining Co. v Alaska United

Mining Co., 46 Law Ed. 331;
Pabst Brew. Co. v E. Clemens Horst Co., (CCA) 264 Fed. 909; and,
Neil v Hyde, 186 Pac. (Idaho) 710-1.

Where a Carey Act construction company, organized under the provisions of the Carey Acts of the United States and the state of Idaho, contracts to sell more water than is available under its appropriations, and in a proper action the trial court enjoins said construction company from selling or disposing of any further water contracts (152 et seq), this injunction operates as against all such water contracts which the construction company contemplated issuing but which have not in fact been issued, and it also operates against such contracts as the construction company or its trustees may have sold and re-acquired prior to such action, where the net contracts remaining in the hands of bona fide settlers, exclusive of said re-acquired contracts, requires more than the total available appropriated water. Argued at pages 23 to 33 of this brief.

Secs. 5636 and 3065, Ida. Comp. Stats.
State v Twin Falls-Salmon River Land & Water Co., 166 Pac. (Idaho) 220-8;
State v Twin Falls Land & Water Co., 217 Pac. (Idaho) 252;
Boley v Twin Falls Canal Co., 217 Pac. (Idaho) 258; and,
Gerber v Nampa & Meridian Irr. Dist., 100 Pac. (Idaho) 80-6;
Provision in "state contract" forbidding such company from selling water in excess

of the appropriation (54), which provision is a part of each settler's contract (96).

Under the facts as outlined in the preceding paragraph, although in re-acquiring such water rights the defendants may have also acquired the land in some of the cases, and although sec. 3018 Ida. Comp. Stats. provides that such water rights attach to and become appurtenant to the land as soon as title passes from the United States to the state, and although defendants may have the right to sell and dispose of the bare lands so re-acquired, nevertheless it was and is proper to enjoin the defendants from disposing of said re-acquired water rights, as the same are not inseparably appurtenant to the land, and as it would be permitting the defendant to do indirectly what it can not do directly. Argued at pages 33 to 38 of this brief.

See. 3052 Ida. Comp. Stats.
Bennett v Twin Falls North Side Land & Water Co., 150 Pac. (Idaho) 336-340;
Sanderson v Salmon River Canal Co., 199 Pac. (Idaho) 999-1003.
Childs v Neitzel, 141 Pac. (Idaho) 77-82.
Commonwealth Trust Co. of Pittsburgh v Smith, 273 Fed. 1-10; and,
Twin Falls Salmon River Land & Water Co. v Davis, 267 Fed. 382.

When a Carey Act construction company has sold all of its appropriated available water supply the purchasers then own the entire system as tenants in common, bound of course by the terms of

their agreement to have the system administered through the agency of the operating company. Argued at pages 38 to 40 of this brief.

Boley v Twin Falls Canal Co., 217 Pac. (Ida.) 258-262;
Adams v Twin Falls etc. Co., 161 Pac. (Ida.) 322-4;
State v Twin Falls etc. Co., 166 Pac. (Ida.) 220-5;
Sanderson v Salmon River Canal Co., 199 Pac. (Ida.) 999-1002;
26 R. C. L. p. 1214;
39 Cyc. p. 1616; and,
4685 U. S. C. S.

Upon considering a petition for rehearing an appellate court can not, without granting a rehearing, alter its prior opinion and decree in such manner as to materially and prejudicially affect the rights of parties not heard. Argued at pages 41 to 43 of this brief.

4 Corpus Juris p. 639;
Losecco v Gregory, 32 S. (La) 985;
Beach on Modern Eq. Juris. Sec. 832;
Clark v Boyreau, 14 Calif. 634;
Argenti v City of San Francisco, 30 Calif. 458-61;
Randolph v Lindsay, 92 Pac. (Ariz) 928.

QUESTIONS NOT INVOLVED UPON THIS APPEAL

The question of the applicability of injunctive relief in the present case was favorably answered by the Circuit Court, and we will only mention the matter briefly here. As stated in the Circuit

Court's opinion (663) the District Court enjoined the defendants from making further sales. This action was affirmed by the Circuit Court, except as to certain shares. In an earlier case (Caldwell v Twin Falls Salmon River Land & Water Co., 225 Fed. 584-600) the same District Court enjoined the construction company from making further sales of water. Upon appeal the Circuit Court held "that the court below was entirely right in enjoining it (the construction company) from making any further sales." Twin Falls Salmon River Land & Water Co. v Caldwell, 242 Fed. 177-191. When the same case was again before the Circuit Court the "injunctional provisions" of the District Court's decree were affirmed. 272 Fed. 356-67. In other words, the Circuit Court has held upon three different occasions that injunction will lie in situations like that involved in the present action. See also Wyatt v Larimer & Weld Irr. Co., 33 Pac. (Colo) 144, and the comments made thereon by the Supreme Court of Idaho in the case of Sanderson v Salmon River Canal Co., 200 Pac. (Ida) 341-3.

For the same reason we assume that it is not necessary to discuss in this brief the questions of the effect of the issuance of patent, or the effect of the lis pendens.

ARGUMENT

The first specification of error alleges that that part of the Circuit Court's decree which reverses the decree of the District Court and permits additional shares to be sold is contrary to the findings of the District Court and erroneous, because the said findings are based upon disputed questions of fact.

As heretofore stated, it is alleged in the complaint that when the Idaho Irrigation Co. had sold sufficient water rights to exhaust the actual amount of water available under its appropriation it should sell no further rights (29-0), and it is further alleged that at the time of filing the complaint said Idaho Irrigation Co. had already oversold such appropriations (32). By their answer the defendants admit that when the Idaho Irrigation Co. "had in truth and in fact sold shares in said company which should and did represent the actual amount of water available and appropriated, and when said sale of shares should equal the carrying capacity of said irrigation system, then and in that event the said Idaho Irrigation Company should make no further sales of water rights . . ." (114). The defendants deny that the available water supply had been oversold. Upon this issue evidence was tendered by both parties, and the District Court, at pages 150 and 151 of the record, states:

> ". . . it is impossible in any view I am able to take of the record to find that defendant could more than supply its outstanding contracts, **exclusive of those it has acquired** through foreclosure procedings . . . . .
>
> ". . . It is sufficient to know that with the duty hereinbefore recognized the supply is and will be insufficient to meet the demands of the outstanding contracts, exclusive of those involved in this suit, and I have no hesitation in so finding."

Thereupon the District Court enjoined the defendants from selling further water or water contracts, whether held at the date of filing the suit or acquired thereafter, and also decreed to be of no effect certain contracts as to lands enumerated in the decree (153 et seq).

The Circuit Court of Appeals sustained the finding of the District Court upon the question of whether or not the available water supply had been oversold in the following words:

> "The evidence submitted by the defendants tends to establish the fact that not only has the water supply for this project been exhausted by the sales of shares already sold of water stock, but that **the available water supply has been very much oversold.**" (676)

In other words, it is admitted by the defendants that when the Idaho Irrigation Co. had sold its available and appropriated water supply it should sell no more, and upon evidence submitted at the trial the District Court found that such company had already oversold said water supply. This

finding is upheld by the Circuit Court of Appeals, yet the latter court reverses the District Court to the extent of permitting the sale of 5322.26 additional shares.

Our position upon this point is, that the question of whether or not the defendants had actually oversold the available and appropriated water supply was a disputed question of fact, and the trial court, upon conflicting evidence, having made a finding, such finding is conclusive upon appellate courts. The Court's attention is called to the fact that the admission in defendants' answer is not a qualified admission, but it is a point-blank allegation that when all of the appropriated water has in fact been sold, then the defendants should sell no more water. All of the water has been sold and the Circuit Court was in error in reversing the District Court to permit additional water to be sold. We argued this point to the Circuit Court, but that Court did not see fit to mention it in its opinions. We believe that this proposition is decisive of the whole case, and, therefore, respectfully urge this Honorable Court to give the matter its attention. As a matter of law the general statement that the finding of a trial court upon disputed questions of fact, when here is conflicting evidence, is conclusive upon appeal is so well established that numerous authorities are unnecessary. Therefore, we will cite only

three cases, one from this Court, one from the Circuit Court of Appeals for the Ninth Circuit, and one from the Supreme Court of Idaho:

McKinly Creek Mining Co. v Alaska United Mining Co., 46 Law Ed. 331;
Pabst Brew. Co. v E. Clemens Horst Co., (C. C. A.), 264 Fed. 909; and,
Neil v Hyde, 186 Pac. (Ida) 710-1.

Under this state of the record we urge that the Circuit Court erred in reversing the decree of the District Court. Of course, if there be some sufficient reason at law to justify a different holding as to the 5322.26 shares the Court's action would not be open to objection. A careful reading of the opinion of the Circuit Court of Appeals, as well as the same Court's opinion upon petition for rehearing, does not reveal to us any semblance of reason for avoiding the above rule and ignoring the admission of the defendants and the District Court's finding. Therefore, it is insisted that the finding of the District Court to the effect that the defendants had oversold the appropriated water, exclusive of the 5322.26 shares under consideration, is conclusive, and that the District Court's decree should be affirmed.

The second specification of error is, that since said 5322.26 shares stood in the name of the defendants at the time of the institution of the action, and since there is no fundamental difference in law or fact between these shares and the re-

mainder of the shares held by the company at the time of the entry of the decree, the Circuit Court erred in reversing the District Court's decree in this particular.

In its original opinion the Circuit Court concluded that these 5322.26 shares were not included in the injunction (682). Though at an earlier point in its opinion the Circuit Court stated that the decree of the District Court enjoined the defendants from selling or disposing of any of said shares which any of the defendants held as assets of the Idaho Irrigation Co. at the time of the commencement of the suit, or which had been acquired since that date (663). Defendants filed a petition for rehearing and called the attention of the Circuit Court to the fact that said 5322.26 shares were included in the injunction by the District Court, and thereupon the Circuit Court, without a hearing, entered its order (689-0) directing that said 5322.26 shares be excluded from the operation of the injunction, and affirmed the District Court's decree, as so amended.

To get the figures clearly before this Court, we will say that the various acreages mentioned by the Circuit Court at pages 681 and 682 of the record were taken partly from the stipulation of counsel, contained at pages 568-9 of the record, and partly from the defendants' exhibit 11, which is the exhibit mentioned in the stipulation just re-

ferred to. The pertinent part of this exhibit is as follows:

OWNERSHIP OF LAND UNDER IDAHO IRRIGATION SYSTEM

Carey Act entries	69,107.20
Non-Carey Act, School, Desert, etc.	19,728.51.
Total water shares sold	88,835.71
Held by company at time suit commenced	8,467.07
Held by purchasers at time suit commenced	80,368.64
Acquired by company since suit commenced	4,255.57
Held by purchasers at present time	76,113.07
Land entries subject to cancellation (Exhibit 27)	887.45
Net lands in hands of settlers	75,225.62

The effect of the District Court's decree, as originally entered, was to fix the acreage of the project at the last mentioned figure of 75,225.62 acres. However, by stipulations and amendments (160-6) the acreage was increased to the approximate figure of 76,000 acres, and it is plaintiff's contention that the project should not be increased beyond this latter figure.

From said figure of 8467.07, which represents the land and appurtenant water shares held by the Idaho Irrigation Co. at the time the present suit was instituted and lis pendens recorded, the Circuit Court deducted 3143.61, the shares sold to interveners after the filing of the suit and be-

fore the entry of the decree (568 and 682), and the remaining 5323.46 shares (which number the Circuit Court's opinion gives as 5322.26) it excluded from the operation of the injunction. Upon what theory of law or fact this was done we are not advised by the opinion.

Said 5322.26 shares were acquired by the defendant company prior to the filing of the suit, through foreclosure, purchase and adjustments of various kinds. As to these shares the defendants, in replying to the allegations of paragraph 22 of the complaint (33-4), and in paragraph 23 of their answer, "Admit that said shares of stock so held are the assets of the Idaho Irrigation Company, Ltd., and are held for the benefit of the bondholders of said company;" (118) Also during the trial counsel stipulated that the Idaho Irrigation Co. was the "beneficial owner" of these shares (569). The shares sold to the interveners were so sold "with the understanding and agreement that in the event of an adverse decision to said defendants in this action that said trustees would make compensation of a refund to the purchasers of said shares of stock." (568)

Since these 5322.26 shares represent the assets of the defendant Idaho Irrigation Co. we can see no plausible reason why the same should be exempted from the operation of the injunction. The Circuit Court upheld the action of the District

Court in enjoining the sale of all other shares held by the defendants as assets of the Idaho Irrigation Co., but because such shares were once sold to settlers the Circuit Court apparently considered that the same were in a different legal situation. The very purpose of the action was to prevent the further sale of the shares held by the defendants, and whether a certain share has always been in the name of the defendants and never been sold, or whether it has been sold and re-acquired before the institution of the suit, it should, it seems to us, be equally subject to the injunction. When the defendant company sold these 5322.26 shares and re-acquired them by foreclosure or purchase or assignment before the filing of the present action such defendants did not thereby acquire any greater rights than the Idaho Irrigation Co. originally had. Childs v Neitzel, 141 Pac. (Ida.) 77-81. Such a sale and repurchase could not so transform the nature of a share as to make it immune from the operation of the injunction. In the case just cited the court stated, at page 82 of the report, that a subcontractor "could not deprive the purchasers of water rights under such system of their rights, or acquire a right by foreclosure of a lien or mortgage for such construction work as would deprive the water right purchasers of their rights under their contracts." By foreclosing his lien or mortgage the subcon-

tractor could certainly acquire all the rights of the construction company, and if such subcontractor could not thereby deprive the water right purchasers of their rights under their contracts, we believe, and urge, that it is a justifiable legal inference that the construction company in the instant case could not by foreclosing its contract liens deprive the plaintiff water right purchasers, and those of their class, of their rights under their contracts.

The next reason we shall advance to show that the Circuit Court is in error in permitting the sale of these additional 5322.26 shares is, that, in view of the finding of the trial court as to the insufficiency of the water supply to "meet the demands of the outstanding contracts, exclusive of those involved in this suit," (151), which finding was affirmed by the Circuit Court (676), the defendants are forbidden by the express terms of the statutes of the state of Idaho, and by the express provisions of the contract between the state of Idaho and the defendant company (54) to sell water contracts beyond the available supply. The particular sections in mind are as follows:

> "No. 5636. Company to furnish water on demand. Any person, company or corporation owning or controlling any canal or irrigation works for the distribution of water under a sale or rental thereof, shall furnish water to any person or persons owning or controlling any land under such canal or irriga-

tion works for the purpose of irrigating such land or for domestic purposes, upon a proper demand being made and reasonable security being given for the payment thereof; Provided, That no person, company or corporation shall contract to deliver more water than such person, company or corporation has a title to, by reason of having complied with the laws in regard to the appropriation of the public waters of the state."

"No. 3065. Penalties for unauthorized sale of water rights. Any pretended deed, contract or other instrument conveying or pretending to convey water rights in such irrigation works prior to the filing of such certificate in the county recorder's office or in excess of the water rights or the amount of water authorized to be sold by the department, as shown by the certificate or certificates so issued and filed for record, shall be absolutely null and void, and the owner of such irrigation works, or those claiming to be the owner thereof and the officers, agents and representatives of any such owner or claimant, or those claiming to be the officers, agents or representatives of any such owner or claimant, who shall make or attempt to make any deed, contract or agreement relative to the sale of water rights in such irrigation works, or for the furnishing of water therefrom, prior to the filing of such certificate, or in excess of the capacity of such irrigation works, as shown by the certificate or certificates of the department of reclamation, or who shall violate any of the provisions of section 3064, shall be jointly, severally and personally liable upon and for all such contracts and agreements and for any and all damages, directly or indirectly sustained by the pur-

chasers of water rights or interests in such irrigation works, through the failure of such owner or claimant, or of the officers, agents and representatives of such owner or claimant or of those claiming to be officers, agents or representatives of the owner or claimant, to comply with the provisions of this chapter, and in addition thereto, every such owner, claimant, officer, agent or representative shall be guilty of a misdemeanor, punishable by a fine not less than $100 nor more than $300, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

The provision of the contract between the state and the defendant company referred to is as follows:

> "But in no case shall water rights or shares be dedicated to any lands aforementioned or sold beyond the carrying capacity of the said canal system or in excess of the appropriation of water as hereinbefore mentioned." (54)

The foregoing laws and contract provision constitute a part of the individual contracts issued to the plaintiffs and all other settlers upon the project (96, par. 9). In a case wherein the same Carey Act laws and contracts were before the court the Supreme Court of Idaho, in the case of State v Twin Falls Salmon River Land & Water Co., 166 Pac. 220, stated as follows:

> "Under the general laws (section 3289, Rev. Codes—5636 Ida. Comp. Stats.-), any water company or corporation is forbidden to contract or sell more water than it is entitled

to, and the general law clearly contemplates that such a corporation must not sell more water than it has. The contract of the state with the construction company authorized the sale of water only to the extent of the water right acquired for the reclamation of the lands in the project, and forbids the issuance of water contracts in excess of the appropriation for water. The appropriation permit issued by the state engineer to the construction company permitting it to appropriate 1,500 cubic feet of water per second of time was simply a permit to appropriate that amount of water, provided there was that amount in the source of supply. It would be impossible for the construction company to appropriate 1,500 cubic feet of water in a certain locality where there were not to exceed 500 cubic feet that could be supplied from that source. The permit is simply a legal document, rather than the actual appropriation of water, since a permit cannot place 1,500 cubic feet of water per second of time where nature has placed only about one-third of that amount.

"It is clearly manifest from said contract that notwithstanding the estimated water supply, the state realizing the possibility of error in weather forecasts, expressly provided that water contracts should not be sold in excess of the water rights belonging to the company. By the terms of the state contract the company agreed to sell shares of water rights "to the extent of the water rights to which it is entitled . . . but in no case shall water rights or shares be dedicated to lands before mentioned or sold beyond the carrying capacity of the canal or in excess of the appropriation thereof." This language

> ought not to be construed to mean that the company might sell water rights for far more land than its water supply could reclaim. To do so would be to ignore the spirit and the letter of the contract between the state and the company." See pp. 228-9.

The construction so placed upon section 5636, Ida. Comp. Stats. by the court of last resort of Idaho must be followed by the courts of the United States, even though the latter courts might be inclined to take a different, or opposite, view of the matter 15 Corpus Juris, p. 927.

In the three following cases the same question arose, but in the reverse manner, that is, it was attempted to compel a Carey Act construction company, or similar company, to sell and deliver water to an applicant. The court in each instance held that before the mandate could issue it must be shown that there was ample water available, in addition to that used by the outstanding contracts:

State v Twin Falls Land & Water Co., 217 Pac. 252;
Boley v Twin Falls Canal Co., 217 Pac. 258; and,
Gerber v Nampa & Meridian Irr. Dist. 100 Pac. 81-6.

We feel justified in stating that the state of Idaho, in placing this provision in the contract with the construction company, was but making an honest endeavor to comply with the spirit and letter of the federal Carey Act. In fact the follow-

ing quotation from sec. 4685 U. S. C. S. would seem to almost require such provision to be inserted in the contract between the state and construction company:

> "Any state contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, **except to secure their reclamation,** cultivation and settlement." par. 3.

In other words, assuming that the District and Circuit Courts are correct in finding that at the time of the filing of the complaint the defendants had already oversold the appropriated water supply, exclusive of those shares re-acquired by defendants, we have the latter court authorizing the sale of further water contracts, although such sales are contrary to the positive provisions of the federal and state Carey Acts, and contrary to the state and settlers' contracts. Under these circumstances we urge that the Circuit Court erred in directing that these 5322.26 shares might be sold.

Solicitors for the defendants have suggested at various stages of this action, as we understand their position, that when a share of water stock is sold to a settler sec. 3018, Ida. Comp. Stats. automatically operates to render such share of water stock an inseparable appurtenance of the land of

the settler from the date of the sale henceforth, and, therefore, since the defendants acquired the land when they re-purchased or foreclosed said 5322.26 shares, the Court was powerless to enjoin them from selling said lands and the appurtenant water. Said section is as follows:

> "The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the state."

Assuming that we are right in anticipating defendants' position upon this matter, we suggest that there are at least four convincing reasons why such position is not tenable.

In the first place: By providing in Sec. 3052, Ida. Comp. Stats. that Carey Act water can be sold, transferred, or leased for a period not exceeding one year, it is clear that the Legislature of Idaho did not intend to create said 5322.26 shares an inseparable appurtenance of the land which such shares were originally sold to be used upon. Sec. 3052 is as follows:

> "The owner of any lands to which a water right has been made appurtenant pursuant to the provisions or operations of the act of congress of the United States known as the Ca Carey Act may transfer such water right, in whole or in part, to other land owned by him and lying within the same irrigation apportionment or segregation and may, by sale or by lease for a period not exceeding one year, transfer such water right or any portionthere-

of to another for use upon or in connection with any other lands, in the manner and on the conditions set forth in this chapter."

In the second place: The Supreme Court of Idaho, in construing said sec. 3018 has emphatically held in the two following cases that such section does not render Carey Act water inseparably appurtenant to the land as soon as title passes from the United States to the state:

"Under the provisions of sections 3017-28 Idaho Comp. Stats., the legislature has declared that the water rights to all lands acquired under the provisions of the chapter in which said section is found shall attach and become appurtenant to the land as soon as the title passes from the United States to the state. That statute could not and did not make the water right an inseparable appurtenant to the land any more than it could make a building situated upon land, or timber growing on land an inseparable appurtenant to the land. The owner of the realty on which he has placed buildings and has trees growing may sell the growing timber without selling the land, and the purchaser may remove them from the land."

Bennett v Twin Falls North Side Land & Water Co., 150 Pac. (Ida) 336-40

"C. S. Sec. 3018, providing that water rights to all Carey Act lands shall attach to and become appurtenant to the land as soon as title passes from the United States to the state, does not, and cannot, have the effect of making the water right an inseparable appurtenance of the land. To give it such effect would be to render it unconstitutional."

Sanderson v Salmon River Canal Co., 199

Pac. (Idaho) 999-1003.

In the third place: There is no evidence in the record to show that title to the land to which said 5322.26 shares were appurtenant passed to the defendants when they re-acquired the same. In fact title to these lands may never have passed from the state, because under the provisions of secs. 3009 and 3014, Ida. Comp. Stats. three or four years, or more may intervene between the issuance of the contract to the settler by the construction company and the issuance of patent to the settler by the state. Naturally if the settler did not have title to the land when the construction company foreclosed its contract, title to such land would not pass to the purchaser at sheriff's sale. Furthermore, as the record shows that there is no water available for these 5322.26 shares we cannot see how it had a lien on such land, for "it is settled that the lien of the construction company can only extend to the acreage for which it furnishes an adequate quantity of water." Commonwealth Trust Co. of Pittsburg v Smith, 273 Fed. 1-10, Twin Falls Salmon River Land & Water Co. v. Davis, 267 Fed. 382.

In the fourth place: We adopt the words of the District Court to express our position upon this point (145-6):

> "If defendant sold water rights in excess of its available water supply it did wrong, and if to right such wrong we reduce the pro-

> ject by extinguishing rights of the wrongdoer, however it may have acquired them, there is no one to complain. No private party has any adverse interest, public policy will be subserved for both the federal and state statutes contemplate an ample rather than an insufficient supply for all lands within the project, and defendant is not injured, for by the proposed action the project will be simply reduced to the size at which it should have been held, under the law. In other words, after the proposed reduction, the defendant will have as many contracts in the aggregate as it originally had the right to sell, and hence the plaintiffs' prayer is for a restoration of the project to a legal status, by taking from defendant water rights which, though legally acquired, are the equivalent of other rights which it illegally sold, and the proceeds of which it appropriated and retains."

Therefore, if the Circuit Court reversed the District Court as to said 5322.26 shares because of the fact that the same had passed through the hands of settlers and back into the ownership of the defendants prior to the institution of the action, it clearly committed error. In equity the defendant's ownership of these 5322.26 shares is just the same as their ownership of all the other shares that have never been sold. Both courts have held that the defendants should not sell the original contracts which they have always held, therefore, if the defendants be allowed to resell 5322.26 shares just because such stock has passed through the hands of settlers, it would be permitting the

defendants to do a thing indirectly which they could not do directly. "Construction companies of this kind will not be permitted to do indirectly what they are prohibited from doing directly. They will not be permitted to make contracts with third parties in regard to the construction or completion of an irrigation system whereby the landowners or purchasers of water rights can be deprived of the rights acquired under their water right contracts." Childs v Neitzel, 141 Pac. (Ida) 77-82. If a construction company will not be permitted to make contracts with third parties in regard to the construction of a system whereby the settlers will be deprived of their rights, then such company should not be permitted to make contracts with new purchasers that would have the same disastrous effect upon the present settlers. As the court observes at page 85 of the report of the Childs case, the contracts therein involved are very similar to Carey Act contracts.

Independent of said 5322.26 shares the defendants have sold far more than the available water supply justifies and it would be a harsh ruling indeed that would enable the defendants to proceed and sell these additional shares, and thereby so impair plaintiffs' water right as to make it impossible to produce ordinary agricultural crops.

We believe that the Circuit Court committed error in permitting the sale of these 5322.26 shares for the further reason that, under the statutes and

decisions of the state of Idaho, and the federal Carey Acts, the defendants in making the appropriations of water and constructing the system acted as a quasi public corporation and as a trustee for the plaintiffs and the other settlers upon the project, with the primary purpose of getting the land reclaimed and cultivated in small tracts by actual settlers. "Manifestly, when the carrying capacity of the canal system is sold, or when all the water so appropriated by the company has been sold, the purchasers then own the entire system as tenants in common, bound of course by the terms of their agreement to have the system administered through the agency of the operating company." Boley v Twin Falls Canal Co., 217 Pac. (Ida) 258-62.

> "Said Land & Water Company is simply a Carey Act construction company formed only for the purpose of acquiring a right to the use of water which it temporarily holds, in a certain sense, as trustees for the prospective entrymen, and which water right the entryman perfects by the application of the water to the reclamation of such lands. The Land & Water Company at no time has a perfected water right in the sense that it has applied the water to the reclamation of the land."
>
> Bennett v Twin Falls North Side Land & Water Co., 150 Pac. (Ida) 336-340.

Upon this point see the following authorities also;

> Adams v Twin Falls etc. Co., 161 Pac. (Ida) 322-5;

Childs v Neitzel, 141 Pac. (Ida) 77-83;
State v Twin Falls Etc. Co., 166 Pac. (Ida) 220-5;
Sanderson v Salmon River Canal Co., 199 Pac. (Ida) 999-1002;
26 R. C. L. p. 1214;
39 Cyc. p. 1616; and,
4685 U. S. C. S.

Under the above authorities, and in view of the fact that the appropriated water has already been oversold, said 5322.26 shares, if they represent any property at all, are in equity and good conscience the property of the plaintiffs and their co-settlers, and this Court will surely refrain from making a disposition of property that will work such great and irreparable injury upon the equitable owners thereof. If these shares can be sold it means that the water for the new purchasers must be taken from the water rights of the plaintiffs and the class whom they represent, and would in effect reduce the water right of the present settlers by seven per cent. When it is borne in mind that the appropriated water falls short of supplying the plaintiffs and their class at the rate the District Court found to be necessary (149) for the proper irrigation of the land, the conclusion is inevitable that if these additional shares are permitted to be sold no settler will receive anything like an adequate water supply. As the project is composed of arid land a short water supply means failure.

The third specification of error is that the Circuit Court erred in denying plaintiffs' petition for rehearing and modification of the Court's order of February 19, 1923. This order is contained at page 697 of the record.

After the Circuit Court had filed its opinion and decree the defendants filed a petition for rehearing. This petition was denied, but in denying it the Circuit Court so changed its former opinion and decree as to permit 5322.26 additional shares to be sold (689-692). Of course, this action very materially and prejudicially affected the rights of plaintiffs and their class, yet they were not permitted to be heard in the matter, as the petition for rehearing was never granted, the Court simply giving such relief upon the filing of the petition. Thereupon, plaintiffs filed a motion for reconsideration of the Court's opinion and decree so changing its former opinion and decree (695). This petition or motion was denied, and it is the Court's action in denying the same that is complained of in the second assignment of error (725-6) and the third specification of error. Upon this proposition see the following authorities:

> "Ordinarily material alterations in the original judgment must be reserved for the rehearing proper and cannot be allowed on the hearing of the petition; . . . As a rule, the appellate court cannot make a final disposition of the cause on an application for rehearing."

4 Corpus Juris p. 639.

"On rehearing. Provosty, J., 'Ordinarily when oral argument is heard on application for a rehearing the court, in passing upon the application proceeds to make final disposition of the cause. This having been done in the present instance plaintiff complained that tht case had been decided without affording him a hearing; and as the complaint was technically well founded the court set aside the judgment and fixed the case for hearing and for a third time heard oral argument"

Losecco v Gregory, 32 S. (La) 985.

"A final decree cannot be altered in any respect without a rehearing."

18 Enc. of Pleading & Practice 4.

"The rule is that a decree shall not be altered or varied in a material part without a rehearing."

Beach on Modern Eq. Juris., sec. 832.

"After a judgment has been rendered by the Supreme Court, a material modification of such judgment should not be made upon a petition for rehearing—the rehearing should first be granted."

Clark v Boyreau, 14 Calif. 634 (Syl).

In the later California case of Argenti v City of San Francisco, 30 Calif. 458-61, the Court stated that the judgment could not be changed or modified in passing upon the petition of rehearing, "because it was not the proper practice, as was held in Clark v Boyreau, 14 Cal. 634-8, to make a material modification of the judgment upon a petition for rehearing, but if made at all it was to be done after the rehearing was had." In the case of Randolph v Lindsay, 92 Pac. (Ariz) 928,

the court refused to express an opinion upon certain questions of practice raised in the case "since the motion for rehearing having been withdrawn the appellant is without opportunity to file a brief in his own behalf in reply."

Aside from the legal phase of this action by the circuit court we believe that the inequities resulting to plaintiffs therefrom will present a strong appeal to this Court. The proposition of rendering the properties and homes of approximately 1000 settlers worth at least seven per cent less, and in some cases rendering such properties and homes valueless, is most certainly of such profound importance as to entitle the settlers to a hearing in the matter. The Circuit Court did not afford the settlers a hearing before doing this, and we most earnestly urge that this action constituted reversible error.

CONCLUSION

By reference to pages 149-0 of the record it appears that the District Court found that "the highest amount it (the defendant irrigation company) has ever delivered in any year is 170,968 acre feet, and the average is 122,817 acre feet; and its reservoir is now empty, as it has been in some of the other years, prior to the close of the irrigation season." The District Court undoubtedly took these figures from defendants' own exhibit

ty per cent water right. Then if this fractional water right of the plaintiffs' is further cut down by permitting the defendants to sell 5322.26 additional shares it can readily be seen that great and irreparable injury will follow to many settlers.

The situation of the plaintiffs in this case has been very aptly described by the Idaho Supreme Court in the case of Childs v Neitzel, 141 Pac. 77-81, in the following words:

> "The Murphy Company had employed engineers and experts to examine said irrigation project as to its feasibility, the quantity of water that could be obtained for the irrigation of said land, and the cost of the construction of said system to make the water available to the land to be irrigated, and after that was done, an estimate was made of the amount to be charged for each acre water right that would be necessary and sufficient to construct said system and pay a good profit to the Murphy Company. Under said water contracts it was not expected, contemplated, or necessary for the purchasers of water rights to employ engineers and other experts to make a proper estimate of the amount of water obtainable, and the cost of the construction of the system and to ascertain whether the company could place the water at feasible points near the land to be irrigated. That had been done by the Murphy Company, and it sold water rights upon the representations that it had water sufficient to furnish each purchaser with the amount called for in his water contract, and also was able to construct said system and complete it. Hence the purchasers of water rights under such system

> had a legal right to depend upon the estimates made by the irrigation company and upon their contracts with it, to the effect that the company would finish and complete the system and furnish the water according to the terms of the contract. They did not purchase under the rule caveat emptor."

As stated by the court at page 85 of the report of the case just quoted from, "the contracts entered into with the purchasers of water rights are similar in many respects to those entered into by the purchasers of water rights under the Carey Act."

The above quoted remarks of the Idaho court apply a great deal more forcefully to the contract purchasers under a Carey Act project, because a Carey Act project is fostered and supervised by the state and federal governments, and a purchaser should have stronger reasons for depending upon his contract being fulfilled. However, the legal duty of holding a Carey Act irrigation project at a reasonable and proper acreage rests primarily upon the construction company. The construction company, the defendant Idaho Irrigation Co., has solemnly agreed with the state of Idaho and with each of the contract holders upon the project that it will not sell water rights "in excess of the appropriation of water" (54 & 96), and the legislature of Idaho has forbidden the defendant to sell water rights in excess of the appropriated water, (5636 Ida. Comp. Stats.); and the legislature of

Idaho has provided that any instruments or contracts pretending to convey water rights in such irrigation works in excess of the water rights or amount of water authorized to be sold by the department (of Reclamation) shall be null and void, and the person attempting to make such conveyances shall be guilty of a misdemeanor, (3065 Ida. Comp. Stats.); and the department of Reclamation has ordered the defendants not to sell any further water rights (133-6), yet the defendants have already far oversold the actual appropriation of water, and are about to sell further water rights. Is this not a proper case for the intervention of a court of equity?

~~yet the defendants have already far oversold the actual appropriation of water, and are about to sell further water rights. Is this not a proper case for the intervention of a court of equity?~~

In view of the foregoing facts and authorities we most earnestly urge that every intendment of law and equity demands that the Circuit Court of Appeals for the Ninth Circuit should be directed to modify its opinion and decree and affirm the decree of the District Court.

Respectfully submitted,

W. G. BISSELL,

BRANCH BIRD,

Address: Gooding, Idaho.

KARL PAINE,

Address: Boise, Idaho.

Solicitors for plaintiffs-appellants.